UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ARISTACAR & LIMOUSINE, LTD.

Employer

and Case No. 29-RC-9410

LOCAL LODGE 340, DISTRICT LODGE 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioner

LOCAL 713, INTERNATIONAL BROTHERHOOD OF TRADE UNIONS, AFFILIATED WITH NATIONAL ORGANIZATION OF INDUSTRIAL TRADE UNIONS

Intervenor[1]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Amy Krieger, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

[1] The Intervenor intervened based upon a showing of interest.

2. The parties stipulated that the Employer, a New York corporation with its principal office and place of business located at 335 Bond Street, Brooklyn, New York, is engaged in the operation of a computer dispatched limousine service. During the past year, which period is representative of its annual operations generally, the Employer derived gross revenues in excess of $500,000 from its operations. During that same period, the Employer derived revenues in excess of $5,000 from providing services for firms located outside the State of New York, which services consisted of the interstate transportation of passengers.

Based upon the stipulations of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.[2]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks an election in a unit of all limousine drivers. The Employer contends that these individuals are independent contractors. The Petitioner maintains that they are statutory employees.

[2] During the hearing, the Employer and the Intervenor stipulated to the Intervenor's labor organization status. The Petitioner took no position. Following the close of the hearing, by letter dated June 30, 2000, the Petitioner stipulated that the Intervenor is a Section 2(5) labor organization. Said letter is hereby received as Board Exhibit 2. Accordingly, based upon the stipulations of the parties, I find that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act.

Since about the mid 1980s, the Employer has provided radio dispatched limousine services to various corporate clients. The Employer's current owner is Edward Slinen. Slinen purchased the company in about late 1997.

The Employer conducts its dispatch and billing operations at a building located on 335 Bond Street, Brooklyn, New York. Slinen and his brother, Mark, own the company from which the Employer leases the building. They also own another limousine service, N.Y.C. 2 Way. N.Y.C. 2 Way is separately managed but utilizes the same dispatch office as the Employer, and the two companies have, on occasion, shared dispatchers. N.Y.C. 2 Way is the subject of another petition in Case No. 29-RC-9411, and a Decision and Direction of Election in that matter will issue in the near future.

The Employer services approximately 4000 accounts from its Brooklyn facility. On a weekly basis, it dispatches roughly 3000 calls to 205 "franchisees," each of whom owns and operates a luxury car bearing the Employer's nameplate and logo. In about late 1998, computers were installed in the vehicles driven by these individuals, and since that time, jobs have been dispatched through the computer's main server located at the Bond Street facility to the mobile data terminals (MDTs) installed in these vehicles.[3] The record contained extensive testimony concerning the procedures by which individuals come to operate franchises, the protocol governing the use of the Employer's computerized

[3] It appears that computer hardware, along with a modem, is installed in the vehicle, and a palmtop computer is attached thereto. There was some confusion as to whether MDTs are simply the hardware and modem installed in the vehicles, or whether they also include the palmptop computers attached thereto. For the sake of consistency, MDTs will herein refer to the combined package of the computer hardware installed in the vehicle and the palmtop computer attached thereto.

dispatch system, the method by which franchisees are compensated for their services, the rules and regulations they are expected to follow throughout their shifts, and the entrepreneurial opportunities that are available for them.

The process by which individuals come to operate franchises

The record shows that drivers (franchisees) come to perform services for the Employer through either the *purchase* or the *leasing* of a franchise. It appears that all prospective franchisees, whether they intend to purchase the franchise or lease it, must be interviewed by General Manager Rutenberg regarding their past experience before they are allowed to work. Although experience in the industry is not a prerequisite, those with prior experience driving computer-dispatched vehicles are not always required to undergo training concerning the operation of the computer. The prospective franchisees are given both a prospectus describing the franchise agreement and a copy of the franchise agreement itself. It appears that all prospective franchisees are given the same prospectus and franchise agreement, both of which were drafted by an attorney representing the Employer. In accordance with New York State business law requirements, they are given 10 business days to consider the terms of the agreement. It does not appear that prospective franchisees have ever been given the opportunity to renegotiate or alter any of the agreement's terms, and it appears that all the franchise agreements that have been executed contain identical language.

Although franchisees may purchase *or* lease franchises, either to or from the Employer or to or from other franchisees, it appears that nearly all

franchisees purchase their franchises from the Employer. Several franchisees already owned franchises at the time Slinen purchased the Employer's operation in late 1997, and they simply signed the current franchise agreement at that time. During the years 1998 and 1999 approximately 119 franchises were purchased from the Employer. Although the franchise agreement submitted into evidence sets the price of a franchise at $30,000, in practice the aforementioned franchises have ranged in price from $7,500 to $15,000.

It appears that the Employer financed the purchase of most if not all of these franchises.[4] Those whose franchises were financed by the Employer were generally required to make a downpayment ranging from $275 to about $2000. According to the prospectus submitted into evidence, the balance is financed with interest set at an annual rate of 15%. Slinen stated that the franchisees who received their financing from the Employer are paying the balance by having approximately $130 deducted from their weekly pay until the balance has been satisfied. It does not appear that any of the franchisees that purchased franchises in 1998 and 1999 have paid the balance in full.

As earlier noted, an individual may also purchase a franchise from a franchisee. The franchise agreement places restrictions on the transfer of franchises between individuals. Paragraph 17 of the franchise agreement prohibits the transfer of a franchise without the Employer's written consent. It also appears to require that the seller of a franchise pay the Employer a transfer

[4]Slinen claimed that the Employer finances the purchase of about half the franchises it sells. However, it appears from Employer Exhibit 16, which is a list of the franchises sold in 1998 and 1999, their price and the amount the franchisees paid towards the balance, that none of the franchisees paid the balance in full at the time of the purchase.

fee of "a sum equal to 25% of the value of such assignment or sale" and an additional "processing fee" of $500. At one point, however, Slinen appeared to indicate that the only "transfer fee" required of a seller or a purchaser is a $2,000 deposit the purchaser is required to make on the MDT and a $500 fee for its installation. In any event, it appears that the ownership of few franchises change hands. The prospectus submitted into evidence indicates that from the time the Employer began operating its dispatch service in late 1997 until December 31, 1998, only two franchises were "transferred." The Employer provided no information concerning the transferer or transferee involved in these transactions.

With regard to leasing, as is the case with purchasing, franchises may be leased from the Employer or from franchisees. Only two franchises are currently leased, one from a franchisee and the other from the Employer. The Employer provided no details of the leasing arrangement between the two franchisees. The other franchise is leased by the Employer to Paragon Van Lines.[5] No information concerning the ownership or operation of this entity was provided during the hearing.[6]

To purchase or lease a franchise, according to the prospectus submitted into evidence, an individual must own a dark colored Lincoln Town Car or Fleetwood Cadillac that is not more than three years old. In practice, however, franchisees have been allowed to drive slightly older vehicles, and the color

[5] At one point Slinen testified that the Employer leases two franchises. However, information was only provided concerning the franchise leased to Paragon Van Lines.

[6] It appears that another corporate entity, Yours Car Service, Inc., owns a franchise. However, as was the case with Paragon Van Lines, no information was provided concerning its ownership.

requirements set forth in the prospectus have not been enforced. Those who choose to become franchisees are required to furnish copies of their driver's license, their Taxi and Limousine Commission (TLC) license, and social security and/or other records establishing that they have the proper certification to work in this country. Since both the terms of the franchise agreement and TLC regulations require that franchisees purchase liability insurance for their vehicles in the amount of $100,000/$300,000 and in the amount of $50,000 for property damage, the franchisees furnish the Employer with documents establishing they have obtained this insurance.

New franchisees are further required to pay a $2000 deposit on the MDT. Of this $2,000, $500 covers the cost of installing the equipment. The remaining $1500 is refundable upon the termination of the franchise agreement. The $2000 deposit may either be paid in its entirety upon the purchase of the franchise, or may be deducted over a period of several weeks or months from the pay of the franchisee. As noted above, Slinen testified that when a franchisee sells his franchise, the Employer returns the deposit to the seller, and requires the purchaser to place a fresh $2000 deposit on the MDT. It is not clear whether the MDT is actually removed and installed anew when this occurs. As discussed earlier, there are few if any transfers between franchisees.

When the MDT is installed, the franchisee may have certain individual requirements programmed into the computer. Thus, if he does not wish to transport passengers who smoke, he can have the computer programmed in such a manner that he is not offered fares from such individuals. If he does not

wish to be assigned pickups from a certain account, he can have the computer programmed so that his car is bypassed when such a fare is offered. There was testimony that franchisees have had their names taken off an account, and one franchisee, the chairman of the sunshine fund, only accepts pickups in one zone.

In addition to the fee for the installation of the computer, new franchisees are required to pay the Employer a $250 training fee. Approximately $150 of the $250 training fee covers the cost of maps, which the Employer provides to franchisees. The remainder is used to pay for a course. The course, which may last several hours, is taught by General Manager Rutenberg and appears to cover such topics as how franchisees should dress, how to address customers, the Employer's billing procedures, the operation of the MDT and geography. At Rutenberg's discretion, this course may be waived for experienced drivers. Like the price of the franchise and the deposit on the computer, the training fee is generally deducted, over a period of several weeks, from the paychecks of the Employer's franchisees. The chairman of the security committee, whose duties will be discussed in further detail later in this decision, sometimes provides new franchisees with additional training by driving them out to the Employer's major accounts and teaching them the geography of the area in which they work. The security chairman may, at his discretion, charge the new franchisee $50 or more for this additional training.

In addition, franchisees must carry a cell phone for out of town or airport calls. Franchisees also carry a credit card machine, and are required to display a magnetic sign bearing the Employer's name on their vehicles. The signs are

provided free of charge. However the Employer charges a $10 replacement fee if the signs are lost. Franchisees are further required to carry a tape recorder, apparently to protect themselves if a customer accuses them of rudeness. [7] In the trunk of their vehicles, franchisees must carry an inflated spare tire.

The franchise agreement provides for a one year probationary period. In practice, however, new franchisees are given a 30 day probationary period. During this time franchisees are not assigned out-of-town or airport pickups. At the same time they are not penalized if they fail to arrive at a pickup within the time allotted. At the conclusion of this 30 day period, the chairman of the "security committee," whose function will be discussed in detail later in this Decision, administers a written geography test consisting of 57 questions. The chairman grades the test, and if the franchisee answers 70% of the questions correctly, they are allowed to make out of town or airport pickups. The record shows that at least one franchisee has failed the written test. This individual is assigned airport calls but is not allowed to make out of town pickups.

Once an individual has assumed the regular operation of a franchise, he is required to act in accordance with the various provisions of the franchise agreement. Paragraph 48 of said agreement provides:

> Franchisee is not an employee or agent of Franchisor, but merely a subscriber to the services which Franchisor provides. Franchisee shall at all times be free from the control or direction of Franchisor in the operation of Franchisee's vehicle, and Franchisor shall not supervise or direct the services to be performed by Franchisee, except as specifically set forth herein.

[7] It is note clear whether they are required to keep the tape recorder on throughout the ride.

The protocol governing the use of the computerized dispatch system

With respect to the protocol that franchisees follow when using the computerized dispatch system, there is no dispute that the decision to install MDTs was the Employer's alone, and the Employer worked extensively with the company that programmed the computers to assure that they were programmed in accordance with the Employer's operating requirements. The areas serviced by the Employer are divided into zones, and when a franchisee is ready to begin transporting passengers he enters his password into his MDT. Once the system has identified him, he is able to view, on his MDT, the various zones, the cars booked into each zone, and the number of reservations in each zone. After reviewing this information, the franchisee "books" into a zone by pushing a button on his MDT. Upon booking into the zone, he is placed at the bottom of the list of cars in that zone that are awaiting calls. When the franchisee's turn comes, his MDT beeps, and the screen on his MDT notifies him that a fare is being offered. If the franchisee does not respond within 30 seconds, he "forfeits" the call, and is automatically booked off the computer system. The franchisee may book back in when this occurs, but he is placed on the bottom of the list of cars awaiting calls in the zone he has booked into. If the reason for the forfeit is that due to a computer malfunction he was never informed of the pickup, he can punch in a code to request to be placed back on the top of the list of cars awaiting calls in his zone. At one point General Manager Rutenberg asserted that a franchisee can even punch in this code when the forfeit is not caused by a computer malfunction. He stated that in such cases the dispatcher, who is unable to

determine whether the forfeit was attributable to factors within the franchisee's control, is required to restore the franchisee to his former place on the list. Thus, his testimony appeared to imply that franchisees are free to mislead the dispatchers concerning the reasons that they forfeit jobs. However, Balhar Thandi, the chairman of the security committee, whose function will be discussed later in this decision, stated that dispatchers often refuse to place franchisees at the top of the list if they believe the forfeit was not due to a malfunctioning computer. He testified that if the franchisee can convince him that the forfeit was attributable to problems with the system, he directs the dispatcher to place his name at the top of the list.

If, rather than forfeit the fare, the franchisee accepts the call, he pushes a key on his MDT to do so. Once the fare has been accepted, the screen notifies him of the address of the pickup, the passenger's name, his account number, and his destination. It appears that an estimated time of arrival (ETA) of 15 minutes from when the call was dispatched is programmed into the system. If the driver does not believe he will arrive at the pickup point within 15 minutes, he can enter a later ETA into his computer. At that point, the "knock off" operator employed at the base calls the passenger to tell him when the car will arrive and provide him with the car number of the vehicle. If the passenger is given a late ETA, he may request another vehicle, and his wishes are honored if one is available.

If the franchisee experiences a mechanical problem while he is driving to the pickup address he may "bail out" of the job by punching a code into his MDT.

As is the case with forfeits, it appears that when a franchisee bails out of a call, he is booked off the list of cars awaiting fares in his zone, and is placed at the bottom of the list when he books back in.[8]

When the franchisee arrives at the pickup point, he pushes a key on his terminal to indicate he is "on scene". He then waits for the passenger. If the passenger does not arrive, the franchisee may request a "no show" by punching a code on his MDT. The Employer then attempts to contact the passenger. If the Employer is unable to contact the passenger for the next 27 minutes, the request for a no show is granted. The franchisee may not leave the scene of a pickup without the dispatcher's permission. After the no show is granted, the franchisee is placed on the top of the list for the zone he booked into.

If, rather than failing to appear, the passenger arrives at the pickup point while the franchisee is waiting, the franchisee pushes a key once the passenger enters to indicate that he has been "loaded." If the driver had to wait more than seven minutes from the ETA for the passenger to arrive, the passenger is charged waiting time. Slinen asserted that charges for waiting time may be waived at the franchisee's discretion.

Before departing with the passenger in his vehicle, the franchisee asks the passenger for a voucher. If the passenger presents a VIP card instead, the franchisee fills out a voucher for him. He may then book into another zone while he is "en route" to the passenger's destination.

[8] It appears that in some cases, if a franchisee bails out for what may be deemed a legitimate reason (i.e., the passenger wishes to smoke and the franchisee is driving a "no smoking" vehicle), he is placed on the top of the list of cars awaiting calls in his zone when he books back in.

Once the franchisee and his passenger reach their destination, the franchisee fills out the voucher entering such information as the point of departure, the destination, any stops along the way, waiting time, tolls, parking fees and phone usage. The driver looks up the fare for the ride itself in the rate book, a booklet which sets forth the fares between the various zones the Employer services. This fare along with charges for phone usage, tolls and other fees are then tallied. Before the passenger leaves, he is expected to sign the voucher and initial the information the franchisee has entered concerning telephone usage, waiting time and stops. When the passenger gets out, the franchisee punches a code to indicate he has been "unloaded."

Generally, a franchisee may not book into more than one zone at a time. However, in certain cases, he may book into a zone and bid for a job being offered in another zone by "conditionally" booking into the zone in which the desired fare is up for bid. Each franchise has a number, and the computer determines which of the bidders will be awarded the fare by assigning a random number to the job. The computer awards the fare to the franchise whose number falls closest to the random number.[9]

If a fare is being offered in a zone into which no franchisee has booked, either the security committee, whose function will be discussed in detail later in this decision, or (in the security committee's absence) the dispatcher, may put

[9] In such cases, the computer assigns a two digit number to the job. If the first digit is even, the computer awards the fare to the franchise whose number falls directly above the two digit number. (i.e., if the two digit number is 84, and cars 83, 85 and 86 bid for the job, it will be awarded to car 85.) If the first digit of the two digit number is odd, the computer awards the job to the car whose number falls directly below it. (If the two digit number is 75, and cars 73, 76 and 77 bid for the job, the fare will be awarded to car number 73.)

the call up for bid by placing a “preference” on the call. When a preference is placed on the call, all the franchisees on duty are informed of its availability and told, in effect, that whoever handles the call will be placed on the top of the list of the zone he subsequently books into. If more than one franchisee bids for the job, the fare appears to be awarded through the same numerical bidding system that is utilized for conditional bookings.

During the workday, franchisees may take breaks by punching a key on their MDT. By signifying that he is on break, the franchisee holds any fare that is offered to him for up to 15 minutes from the time that he took his break. After 15 minutes have passed, the fare is offered to the next driver on the list. After an additional 5 minutes, the franchisee is booked out of the zone.

Towards the conclusion of his workday, a franchisee may use the computer to place himself on the “going home” list for the borough he will retire to when he finishes work for the day. If a fare headed for that borough is available, he will be assigned the fare. Thereafter, he is precluded from booking back onto the system for a four hour period.

Entrepreneurial Opportunities

The Employer maintains that the above described system, by allowing franchisees to set their own hours, examine the zones, the reservations that have been made in each zone, and the number of vehicles booked into each zone, allows franchisees to make entrepreneurial decisions as to the manner in which their work should be performed. The Employer further argues there are other options, besides using the dispatch system, that a franchisee may consider in

determining the most profitable method of performing his duties. The record shows that in addition to using the dispatch system, franchisees may work one of the three “lines” serviced by the Employer and other limousine companies. These lines are located near some of the Employer’s major accounts and are only operational during certain parts of the day. It appears that the cars of various limousine services line up at these points. The dispatchers employed by these companies work these lines directing passengers to the vehicles that are lined up on a first come-first served basis. In addition to directing customers to cars, dispatchers may also direct the vehicles to circle the area if they run the risk of blocking traffic. There is no evidence that any of these dispatchers has ever disciplined a franchisee. Passengers picked up at the lines are billed utilizing the voucher system described earlier.

In addition to obtaining fares through the dispatch system and the three lines serviced by the Employer, Slinen contended that franchisees may also accept street hails. Although he maintained that he has seen this occur, he could provide no details concerning which or how many franchisees engage in this practice or how often they do so. Furthermore, TLC regulations prohibit luxury car services from accepting street hails.

Various other limitations appear to have been placed upon the entrepreneurial opportunities that are available to franchisees. There is no evidence that any franchisee owns more than one franchise, and both the prospectus (Section 15), and the franchise agreement (Paragraph 44.7) prohibit

franchisees from hiring individuals to operate the franchise without the written consent of the Employer.[10]

Similarly, there is no definitive evidence that any franchisees work for other car services. Paragraph 16(a) of the prospectus prohibits franchisees from providing transportation services to any individual without the Employer's consent. Paragraph 44.20 of the franchise agreement provides that the Employer may terminate the contract if the franchisee attempts to "directly or indirectly cause any customer of Franchisor to use the services of any business in competition with Franchisor." General Manager Rutenberg testified that when the MDTs were being installed in 1998, the company installing them informed him that one of the franchisees already had another radio in his car. At about that same time the company told him that two other employees who had formerly worked for another limousine service still had the radios from that service in their cars. He asserted that he told the computer installers, "I don't care." Rutenberg testified that one of the three franchisees no longer works for the Employer. With regard to the two other franchisees, at one point, Rutenberg stated he believed that they had removed the extra radios from their vehicles, and at another point he stated that he did not know. The security chairman, whose responsibilities include conducting annual inspections of the franchisees' vehicles, did not know

[10] Paragraph 44.7 of the franchise contract provides that "Permitting a person, partnership or corporation other than franchisee to operate the franchise without (the) prior written authorization of the franchisor" shall be grounds for the termination of the agreement. Section 15 of the prospectus provides in part "the franchisee may, upon approval of the franchisor, permit another person, partnership or coproration to operate the franchise. Said approval must be with the written consent of the franchisor. Breach of this provision is grounds for termination of the franchise agreement."

of any vehicles containing more than one radio. Although the prospectus prohibits providing private transportation services without the Employer's consent, one franchisee testified that he has provided such services for neighbors and acquaintances. He stated that he did not notify the Employer that he had done so.

The prospectus (Section 16(b)) also states that the services franchisees provide to the Employer's customers must be limited to the operation of the franchise (i.e. transporting them on behalf of the Employer.) Thus, franchisees are not permitted to perform other services, such as home repair or landscaping, for the Employer's customers.

It also does not appear that any franchisees enter into private arrangements with passengers employed by the Employer's customers to transport them at certain regular times (i.e., 7:15 a.m. every Wednesday), known in the industry as "booking." Rather, all fares are obtained through the use of the Employer's dispatch service or through working the lines. The rulebook (page 39), which will be discussed in further detail later in this decision, states that booking is punishable by a $1,000 fine for the "first offense."

Compensation

Thus, it appears that franchisees may only derive income through the use of the computerized dispatch system or from working one of the three lines serviced by the Employer. In both cases, franchisees are generally paid through the Employer's voucher system. Franchisees leave their vouchers at the Employer's Brooklyn office, and the Employer uses these vouchers to bill the

customers. On very rare occasions, a passenger will pay for his ride in cash, and when this occurs the franchisee retains the entire fare. When passengers submit vouchers, however, the franchisee only retains a portion of the fare set forth therein.[11] If the franchisee wishes to be paid within four weeks of the date he submitted the voucher, the Employer retains a "service" fee of 15% of the billing price. This fee increases to 22% if the franchisee elects to be paid within two to three days of the voucher's submission. The Employer assesses an additional "service fee" of $1.00 per voucher regardless of when the franchisee elects to be paid. In addition to these fees, a weekly fee of $44 (dues) is withheld from the pay of the Employer's franchisees. Dues are waived for the chairman and members of the security committee and the chairman and co-chairman of the sunshine fund. The franchise agreement (paragraph 36) provides that the Employer may unilaterally increase all these fees by various amounts set forth therein. A Rider to the agreement, however, modifies this provision "to the extent that no fees to franchisees will be increased from those in force at the time this agreement is executed, unless there is an increase in a charge to a customer…" It is not clear when this Rider was added to the franchise agreement. It appears that sometime in about 1998, the Employer increased the percentage that it withheld from the vouchers to its current level, purportedly to cover the cost of the installation of the Employer's computerized dispatch system.

[11] At one point, Slinen testified that if a franchisee brings in a new customer, he earns an additional commission of 1% of the total that the Employer bills to the account. Although he asserted that there was one franchisee receiving such a commission, he could not provide his name or car number.

In addition to these service fees, the Employer deducts 50 cents from each voucher submitted by the franchisee until such time as these deductions total $1,000 or $2,000. According to the prospectus and the franchise agreement submitted into evidence, these fees are contributed to a "health and welfare fund." However, testimony adduced during the hearing initially indicated that this fund is in fact an entity known as "the radio club." The record further shows that this entity does not exist, and that the moneys from the deductions for radio club dues are in fact deposited into the Employer's regular account. The "radio club" was purportedly a fund established by the Employer, with possible input from the franchisees,[12] that was to be used by the Employer to repurchase franchises from franchisees. It appears that when the "radio club" was established, it was contemplated that monthly lotteries would be held during which the Employer would use this fund to repurchase franchises from franchisees for a sum of $15,000. However, only one lottery has been held. Although the record shows that the Employer deposits radio club moneys into its regular account, it appears that franchisees are reimbursed for radio club deductions upon terminating their relationship with the Employer.

Approximately half of the franchisees elect to have an additional weekly fee of $4.00 deducted from their pay. This money is then deposited into the franchisees' "sunshine" fund. Members of the sunshine fund are required to pay a $100.00 initiation fee. This fund was established in 1986, and is administered by a chairman and co-chairman, both of them franchisees. It pays these

[12] There was testimony that franchisees asked Slinen to set up the radio fund.

individuals a weekly salary of $50.00, and neither are required to pay the Employer the $44 in weekly “dues” for the use of its dispatch service. The sunshine fund makes loans, with interest, to its members, covers half the fines its members receive for parking or traffic tickets, and provides them with various miscellaneous benefits including sick pay. It also collects the fines that are assessed after security hearings, which will be discussed further later.

The record appears to show that if a franchisee is unable to work for a significant period of time (i.e. he is out of the country or on vacation), he is not required to pay dues or any other monies to the Employer until such time as the franchise is reactivated.

Although numerous deductions are made from the wages of the Employer’s franchisees, state and federal income taxes and other statutory deductions are not. Franchisees are issued 1099s, pay for their own insurance, and are responsible for meeting all the expenses, such as gasoline and repairs, they incur in connection with the operation of their vehicles.

Rules and Regulations

When operating their vehicles, franchisees are expected to act in compliance with numerous rules and regulations throughout their shifts. They are required to comply with various TLC regulations governing the use of for-hire vehicles. These include, inter alia, having seat belts, affixing a valid TLC decal to the windshield, not charging more than the price quoted by the base, carrying a distress light, being courteous to passengers, and transporting disabled passengers when requested. TLC regulations provide that violators of these

rules may be required to appear before an administrative law judge and are subject to various fines and penalties, including the revocation of their license.

TLC regulations further require that operators of for hire transportation services, such as the Employer, maintain and enforce a set of written rules.[13] In the instant matter, these rules are set forth in a 40 page "rulebook," a copy of which was submitted into evidence. The franchise agreement requires that franchisees treat the information contained in this rulebook as "strictly confidential," and it prohibits franchisees from duplicating it or sharing the rulebook "with any other person" without the permission of the franchisees' "security committee," whose function will be discussed shortly.[14] Although the Employer contends it had no role in the creation of the rulebook, the prospectus it disseminates to prospective franchisees provides that it may modify the rulebook's contents at any time.[15]

The franchise agreement contains numerous provisions requiring the franchisee to act in accordance with the procedures set forth in said rulebook.[16]

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[13] Section 6-07 (c) of the TLC's regulations governing for-hire vehicles provides:

> A base owner shall maintain and enforce rules governing the conduct of affiliated drivers while performing their duty as for-hire vehicle drivers. Said rules shall be submitted in writing to the Commission when the base is licensed by the Commission, and within seven (7) day exclusive of holidays and weekends, thereafter whenever said rules are updated or amended.

[14] Employer Exhibit 4, Section 23.

[15] Section 17(i) of the prospectus provides that the Employer "reserves the right to modify, supplement, or change the Rules and Regulations governing the conduct of all franchisees, provided that the rules promulgated are reasonable."

[16] Section 23 provides in part, "Franchisee hereby agrees to conduct its business in strict and complete accordance with the Rulebook…" Section 24 reads, "Franchisee shall treat all copies of the rulebook and the information it contains as strictly confidential, and shall use all possible efforts to maintain such information as secret and confidential. Franchisee shall not, at any time, without Franchisee Communications Committee (sic) prior consent, copy, duplicate, record, or otherwise reproduce any copy of the rulebook, in whole or in part, nor otherwise make the same available to any other person.

Paragraph 44 of the agreement provides that a franchisee's failure to "follow each and every rule and procedure in the current version of the Rulebook" shall "constitute a material breach of the agreement" and entitle the Employer or the security committee to "terminate the Agreement without notice or payment of any monies for any reason to Franchisee."

The rulebook sets forth in great detail the protocol franchisees are expected to follow throughout their shifts. It describes the vehicles they are expected to operate (dark colored Lincoln Towncar or Fleetwood Cadillac),[17] the equipment they are expected to carry (i.e. flash light, working jack), and how they are expected to maintain the interior of their vehicles (i.e. vacuum daily, clean windows weekly, do not display religious artifacts, do not leave maps or books on front seat, do not smoke or eat inside car, make sure car contains reading light) Similarly, it establishes various standards governing the maintenance of the vehicle's exterior (i.e. tires must be whitewalled and body must be free of dents) and its trunk. It describes the "business tools" franchisees should have ready at hand (i.e. attache case, maps, umbrella) and requires that vehicles display signs bearing the Employer's name and logo and the franchisee's franchise number. Moreover, it sets forth the dress code for both male and female franchisees (dark suit and tie for men, dark colored dress pants or skirt for women) as well as standards for personal hygiene (change all clothing daily.) The rulebook goes on to describe in great detail the protocol franchisees are expected to follow throughout their shifts and the procedures for handling various types of pickups.

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[17] Although color requirements are set forth in the rulebook, it appears that they are not enforced.

Thus, it establishes guidelines for locating passengers in general (i.e., wave sign at people who are waiting in front of pickup address, window signs should face the pickup point) and for locating and greeting customers at airports, restaurants, theatres, hotels and sports arenas. When meeting customers inside airport terminals, for example, the franchisee is expected to carry a sign bearing the customer's name and hold it in an upright manner while waiting for the customer. When picking up a customer at a restaurant, if the customer exits and requests that the franchisee wait, the franchisee is expected to remain at the pickup point until the customer is ready. In dealing with customers in general, the rulebook sets forth a detailed code of conduct (i.e., apologize if late for a pickup, ask passenger if he has a favorite route, do not play religious or ethnic music, discuss politics, take personal telephone calls while customer is in the car, solicit tips, argue with customer, or curse at other drivers when carrying a passenger.)

The rulebook also establishes rules concerning the use of the dispatch system, and contains numerous penalties for failing to adhere to the procedures set forth therein. Some of the rules prohibiting clogging up the airwaves were written when calls were dispatched by voice and are not applicable to a computer dispatched service. Several others are not currently enforced.[18] The final three pages of the rulebook consist of a schedule of fines for various offenses. The

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[18] Among the rules that are not enforced are: Rule 6.1, which states the franchisee must be physically in a zone at the time they book into it; Rule 13.3(A), which implies that there are limits on the number of cars that may book into a zone; the portion of Rule 15.1 that states that franchisees may be asked to appear at checkpoints and be penalized for not doing so within 10 minutes of the request; Rule 12.6 penalizing franchisees for pushing the "unload" key on their terminals when the passenger is still in the car; Rule 6.9 providing for possible penalties for pushing the "on scene" key before arriving at the scene of a pick up; and Rule 6.8 penalizing franchisees for forfeiting 2 calls between the hours of 6:00 p.m. and 11:00 p.m.

record shows that the fines set forth in this schedule constitute the maximum penalties for violations of the rules and that several fines (i.e., a $150.00 fine for forfeits, and a $100.00 fine for the first violation of the Employer's dress code) are not imposed.

The Employer contends that the franchisees themselves, through their "security committee," are solely responsible for promulgating and enforcing the above-described rules. Paragraph 9 of the prospectus given to franchisees prior to the commencement of their employment states, in part, "Rules as to the operation of franchisees (sic) shall be made by a committee of franchisees." As earlier noted, the franchise agreement grants both the Employer and the security committee the right to terminate the agreement for any violation of the rules set forth in the rulebook.[19] It also contains several provisions granting both the Employer and the security committee the right to terminate the agreement for numerous other infractions, including making the rulebook available to other individuals without the committee's consent and attempting to cause customers to use the services of the Employer's competitors.

It appears that the security committee came into being several years prior to the Employer's purchase by its current owner. It is currently composed of a committee chairman, Balhar Thandi, and approximately 7 committee members. The chairman is chosen through secret ballot elections conducted annually among the franchisees. The chairman is responsible for scheduling the

[19] The franchise agreement frequently refers to this committee as the Franchisee Communications Committee. Although there was at one time both a communications committee and a security committee, the communications committee was disbanded several years ago.

elections. Although General Manager Rutenberg owns a franchise, and theoretically has the right to participate in such elections, it does not appear that he or any other managers employed by the Employer play a role in the election of committee chairmen. Thandi, himself a franchisee, is responsible for the selection of committee members and may remove them at will. The record shows that he removed one committee member after receiving complaints from franchisees about that member's belligerent demeanor. The security committee is given, free of charge, an office, a desk, some chairs and a filing cabinet at the Brooklyn facility. Thandi spends at least one day a week at the office. Unlike other franchisees, Thandi is granted access to the dispatch office, and is allowed to attach notes to the paychecks of franchisees informing them of hearings, inspections or related matters. The sunshine fund pays Thandi a weekly salary of $100.00 for his services as committee chairman. In addition, Thandi and other committee members are not required to pay the Employer the $44 in weekly dues for the use of its dispatch service.

Thandi testified that in early 1999, he and the other committee members compiled the current rulebook by examining rulebooks used by various limousine services, including N.Y.C. 2 Way, and selecting from these rulebooks the rules that they believed would be applicable to a computer dispatched company. After the rules had been compiled, he had his daughter type them on her computer. He then gave the printed rules to General Manager Rutenberg and asked him to have the Employer's attorney review them. Rutenberg said he would do so. The Employer subsequently had numerous copies of the rulebook printed, free of

charge. Although Thandi asserted that the rulebook was compiled from various other rulebooks, including that of N.Y.C. 2 Way, the record from the hearing in Case No. 29-RC-9411 showed that the rulebook allegedly utilized by franchisees of that employer is virtually identical to the current rulebook used by the security committee, and even contains the same typographical errors. As is reported more fully in the Decision in 29-RC-9411, much of the testimony in that matter concerning the creation of N.Y.C. 2 Way's rulebook was contradictory. In any event, inasmuch as N.Y.C. 2 Way and the Employer share common ownership and utilize the same dispatch office, Thandi's testimony, along with the record in Case No. 29-RC-9411, *could* support the conclusion that after Thandi presented Rutenberg with a draft consisting of a compilation of rules obtained from various limousine services including N.Y.C. 2 Way, the Employer discarded the rules that had been compiled from limousine services it did not own, and simply reprinted the rulebook utilized by N.Y.C. 2 Way.[20] Although there is evidence that suggests that the Employer, at a minimum, both reviewed the rulebook and paid to have it printed, the cover of the rulebook contains the following disclaimer:

> The Security and Communications Committee of Arista Car & Limousine, LTD composed this book of rules and regulations. Neither Arista Car & Limousine, nor any of its personnel, faculty, or management was involved in the creation of this book.

[20] Neither the draft of the document Thandi claimed to have compiled nor the document that his daughter typed were offered into evidence during the hearing.

Although the franchise agreement grants both the Employer and the security committee the authority to terminate the contract for any violations of the rulebook or other actions deemed detrimental to the Employer, there is no evidence that any franchise contracts have been terminated. General Manager Rutenberg testified that at the request of customers, he has removed franchisees from certain accounts. More commonly, however, violations of the rules are handled through security hearings. To report alleged violations of the rulebook, the security chairman and the other security committee members fill out forms documenting the date of the alleged infraction, the franchisee involved, and the type of offense (i.e. dirty car, out of uniform, misleading the dispatcher, late out of town pickup) These forms, known as security slips, may be filled out by the security chairman or by any members of the security committee. Although supervisors and dispatchers do not write security slips, it is not uncommon for them to hand the security chairman notes documenting customer complaints or other alleged infractions. The committee member then drafts a security slip based upon these notes. The security chairman investigates the matters raised in the security slips by speaking to the franchisee involved, and on rare occasion, the customer. At that point it is up to the security chairman to decide whether or how to proceed further. The security chairman may verbally admonish the franchisee or, if he believes the infraction warrants it, schedule a hearing. Thandi testified that a day of hearings is scheduled once he has collected 13 security slips he deems worthy of trial.

Once the security chairman has collected a sufficient number of slips to schedule a day of hearings, he has the dispatch office send all franchisees a fleet message informing them that a day of hearings is scheduled and soliciting volunteers to serve as jurors. The first three franchisees to respond to this message are selected. It appears that the security committee leaves a note for those franchisees who are being tried informing them of the date and time of their trial. The judge appears to be a franchisee who was elected to that position by his coworkers. As is the case with the members of the security committee, the Employer does not deduct dues from the wages of the judge, and the sunshine fund pays him $75.00 for his services. The sunshine fund pays each juror $50.00. However, the Employer does not waive their dues.

The security chairman commences each hearing by presenting the case against the alleged wrongdoer. He then leaves the room, and the franchisee presents his version of events. The judge and the three jurors then deliberate and reach a verdict. A tape recording is made of the entire proceeding and the tape is stored in the security office. If the franchisee is found guilty, the judge fines him. The amount of the fine is left to the judge's discretion. However, it is generally less than the fines set forth in the rulebook and rarely if ever exceeds a few hundred dollars. When the franchisee is notified of the fine, he is given the opportunity to determine the rate (i.e. $10.00 per week) at which he wishes the fine to be deducted from his pay. It appears that both the fine and the rate at which it will be deducted are entered on the original security slip and another form and the franchisee executes both documents. This information is then

given to the Employer's bookkeeping department. The money from the fine is deposited into the sunshine fund.

During the year 1999, hearings were held on six days. About half the matters involved customer complaints, such as rudeness, or arriving late for out of town pickups and submitting fraudulent vouchers. Generally, since customer complaints are first made to dispatchers, managers and other office personnel, it appears that the investigation of these matters, and the hearing that follows, are initiated, at least in part, by employees of the Employer. The remainder of the hearings involved such matters as dirty cars and failing to adhere to the dress code, many of which were reported by security committee members.[21] When franchisees accused of misconduct failed to appear at scheduled hearings, Thandi had their cars taken off the air until he could speak to them.

Although the penalties imposed by the security committee are generally no more than fines, it appears that on at least one occasion the committee had a franchisee taken off the air for rudeness. Joseph Nussenbaum, Chairman of the Sunshine Fund, testified that in about December 1999, the security committee approached General Manager Rutenberg to request that he terminate this franchisee's access to the Employer's dispatch service. It does not appear that this action followed a security hearing. The committee's request was honored. It is not clear whether this vehicle was ever placed back on the air.

[21] There was contradictory testimony as to the extent that franchisees are required to comply with the dress code set forth in the rulebook. It appears to be clear that franchisees, at a minimum, are prohibited from wearing jeans or shorts and that they are expected to wear a sports jacket. It is not clear whether they must wear a tie.

The security committee is also responsible for enforcing rules concerning the upkeep of franchisees' vehicles. TLC regulations regarding for hire vehicles require that the Employer maintain a list of all franchisees, their names, addresses and telephone numbers, and records showing when vehicles were inspected and the results of said inspections.[22] It appears that the responsibility of conducting these inspections has been delegated to the security chairman. These inspections are conducted on an annual basis. General Manager Rutenberg provides the security chairman with the names, car numbers, and telephone numbers of all the franchisees, and the chairman leaves each franchisee a note with his paycheck informing him when his vehicle will be inspected. The security chairman inspects the vehicle at the scheduled time to see that it contains maps, a tape recorder, a flashlight, a spare tire, a jack, a working air conditioning system, the proper signs and a credit card machine. Both the interior and the body of the car, including its doors, fenders, windshield, paint and windows, are examined. The security chairman then prepares an inspection report documenting the results of the examination. This report consists of a preprinted form on which the franchisee enters some of the information required by the TLC, such as his insurance coverage, the vehicle's make and year, its plate number, his home and car telephone numbers, and his beeper number. The security chairman enters the remaining information concerning the results of the inspection. Copies of the report are given to the franchisee, the security committee, and the Employer's dispatch and billing

[22] Employer Exhibit 25, Section 6-08(e)(2).

office. Thandi testified that on a couple of occasions he has had cars taken off the air due to broken windshields and damaged hoods. The vehicles were placed back on the air once the problems were fixed.

Other alleged functions of the security committee

The Employer maintains that in addition to enforcing rules, the security committee has played a role in determining both the price of franchises and the rates that the Employer charges its customers. At one point Slinen stated that the cost of a franchise is set by the security committee. However, he provided no further information concerning his dealings with the security committee on this issue. Sunshine fund chairman Nussenbaum and Security Chairman Thandi testified that in the past they have spoken to Slinen to request that he increase the price of franchises. Both are long term franchisees who have fully paid for their franchises, and they wished to sell them for a profit. Nussenbaum, it appears, was hoping that the Employer would agree to repurchase franchises for $100,000 through the earlier described radio club lotteries.[23] As earlier noted, the Employer has only conducted one lottery for the purpose of repurchasing franchises, and it does not appear that the franchise involved was repurchased for $100, 000. Since Slinen's purchase of the company, the price of franchises has gradually increased, and it appears that franchises now sell for as much as $15,000. This increase, however, has not been linear, as some franchises were sold in 1998 for $11,000 and some were sold in 1999 for $8,000. There has been

[23] Both Nussenbaum and Thandi spoke English poorly, and their testimony was often difficult to understand.

considerable variation in the prices of franchises, one selling for $7500, some for $8,000, some for $11,000 and others for $13000 and $15000. Given the number of franchises sold since 1998 (approximately 118), the variation in their prices, Slinen's failure to provide any detail at all concerning the security committee's role in setting prices, and the failure of Thandi and Nussenbaum to confirm that the security committee set the price of each and every franchise that was sold in 1998 and 1999, I find that the record does not establish that the security committee is responsible for setting the prices at which franchises are sold.

With respect to fares, Slinen testified that the security committee determined the amount of free waiting time franchisees may grant customers. However, he provided no further details concerning when or how often he met with the committee to discuss this issue or how it was resolved.

There was contradictory testimony with regard to the security committee's role in the creation of the current rate book. It is undisputed that in 1998 or 1999 the Employer used a rate book containing substantially lower fares than the fares that are currently in effect. Thandi and Nussenbaum spoke to Slinen to request an increase in the rates. It is also undisputed that Slinen subsequently spoke to the Employer's customers and they agreed to a rate increase. It is not clear, however, whether the rates were increased by the amount the franchisees had requested.[24] There is no contention that the security committee itself met with customers to negotiate these increases.

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[24] There was some testimony that the security committee simply asked the Employer to increase its rates to those set forth in the NYC2-Way rate book and that the Employer did so after conferring with its customers. Security chairman Thandi, however, testified, that the committee was using both the NYC 2

It appears that Slinen also conferred with the security committee regarding a discount that was given to NBC, one of the Employer's largest customers. The committee was not willing to reduce the compensation for franchisees by the amount NBC was seeking. NBC was ultimately given a 10% discount. However, the compensation received by the franchisees for carrying passengers employed by NBC was only decreased by 5%, and the remainder of the discount was absorbed by the Employer.[25] There is no assertion that the committee itself dealt with the customer in negotiating the discount.

Analysis

In Roadway Package Systems, Inc., 326 NLRB No. 72 (1998), after years of debate concerning the proper criteria by which independent contractor status should be evaluated, the Board stated it would determine an individual's status as an independent contractor through the application of the common law agency test.[26] This test, as described in Restatement (Second) of Agency, Section 220,

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Way rate book and other rate books as a model, and was not sure whether all the increases that were put into effect matched those that were requested.

[25] Some franchisees elected to be taken off this account.

[26] The Employer urges that the Board consider a set of suggested guidelines published by the Internal Revenue Service for determining independent contractor status in the limousine industry. It asserts that if these guidelines were followed, its franchisees would be found to be independent contractors. The Board has repeatedly held that while determinations by the Internal Revenue Service may be considered as they relate to independent contractor status, they are not given controlling weight. Roadway Package Systems, supra at fn. 46; Yellow Cab, Inc. 179 NLRB 850, fn. 5 (1969); Burton Beverage Company, 116 NLRB 634, fn. 12 (1956). Moreover, in the instant matter, the Internal Revenue Service had not made any determination concerning the employee status of the Employer's franchisees. The Employer also cites several cases involving taxi drivers and other employees that were decided by the United States Court of Appeals for the District of Columbia Circuit. It is well established that the circuit court opinions are binding only in the circuit in which they arise. Armour and Company, 63 NLRB 1200, fn. 11 (1945). It is also settled that notwithstanding occasional conflicts with various circuits, Board precedent is generally followed unless or until it is overruled by the Supreme Court. Sonicraft, Inc., 281 NLRB 569, 571 (1986). In any event, in , N.L.R.B. v. Fugazy Continental Corp., 603 F.2d 214, 1979 WL 30910 (2nd Cir., 1979), enf'd, 817 F.2D 979 (2nd Cir. 1987), the Second Circuit agreed with the Board's finding that the franchisees therein were statutory employees.

includes an examination of, inter alia: whether the work being done by the individual is an ***essential part of the employer's regular business***; whether the individual is engaged in a business or occupation that is ***distinct from the employer's regular business; the length of time*** for which the individual is performing services for the employer; ***the skill*** required of the particular occupation; whether the ***employer provides the tools and instrumentalities*** necessary to perform the work; the ***method of payment*** for the work performed; and the extent to which the employer ***may control the details of the work***. The Board emphasized that no one factor is determinative and that factors containing the element of control would not be accorded more weight than those that lacked this element. The above-described test appears to require that the Board draw an overall picture of the relationship between the entities involved and insert the details as the work progresses. Dial-A-Mattress Operating Corp., 326 NLRB No. 75 (1998); AmeriHealth Inc., 329 NLRB No. 76 (1999); Douglas Foods Corp., 330 NLRB No. 124 (2000). The Board's published decisions regarding independent contractor status in the taxicab industry predate Roadway and revolve, in large part, around the right to control test. However, it is clear that the Board attempted to build this same picture by examining the degree of financial interdependence between the drivers and their alleged employers. National Labor Relations Board v. O'Hare-Midway Limousine Service, 924 F2d 692 (1991). If the employer's income was largely derived from the fares collected by its drivers, the employer could be presumed to have an incentive to control their work so as to maximize the number of fares they collected. Metro Cars, Inc., 309

NLRB 513, 517 (1992); Yellow Cab of Quincy, 312 NLRB 142, 145 (1993). Similarly, if the drivers depended exclusively upon their employer as their source of income, this factor would weigh in favor of a finding of employee status.

Although the relationship between the Employer and its franchisees contains some elements that support a finding of independent contractor status, an examination of the overall picture of their relationship, particularly their financial interdependence, shows that it bears a greater resemblance to a master – servant relationship than to a relationship between two businesses. Thus, their interaction does not resemble, for example, the relationship between a plumbing contractor and restaurant owner who pays the contractor to install new bathroom fixtures at his restaurant. Unlike the plumber in the above example, the franchisees are not engaged in an occupation that is ***distinct*** from the Employer's business. Rather, franchisees are, by and large, employed exclusively by the Employer. They hold themselves out as employees of the Employer, carrying signs that bear the Employer's name and logo. They are contractually prohibited from servicing customers on behalf of competitors. The use of their vehicles to perform private transportation services without the Employer's consent is also forbidden. Although one franchisee has ignored this latter prohibition, there is no evidence that franchisees have been informed that they are free to disregard the terms of the contract. Thus, not only is it clear that franchisees are not engaged in an occupation that is distinct from the Employer's business, it is also beyond per adventure that the work they perform is an ***essential part of the Employer's business.*** In contrast to the situation

involving the plumber and the restaurant owner, the entire business of the Employer is devoted to providing customers with the services its franchisees perform. Further, not only are the services performed by the Employer and the work done by its franchisees inextricably intertwined, they are intertwined on a ***long-term*** basis. The relationship between the Employer and its franchisees is long term, in part, because the Employer provides several of the ***tools and instrumentalities*** the franchisees need to perform the work. It generally finances, or at the very least, requires a minimal downpayment for several of the costs involved in the purchase of most franchises (i.e. the price of the franchise, the training fee, the deposit on the computer). Thus, it usually takes franchisees several years to work off their debt. There can be little doubt that the MDTs installed by the Employer, the training class on their use, and the dispatching performed at the base, would meet the common law definition of tools and instrumentalities as set forth in the Restatement. It is thus apparent that in contrast to the case of the plumber and restaurant owner, the work of the franchisees and the business of the Employer are very closely connected. It is long term, the franchisees work solely for the Employer, the Employer provides the instrumentalities and tools they need to perform the work, and the work they do is an essential part of the Employer's business.

From this latter factor it follows that ***a significant portion of the Employer's income is derived from the fares collected by franchisees.*** During the hearing, the parties entered into a stipulation concerning the sources of the Employer's income that made little sense, as it occasionally labeled items

that were clearly not revenues, as revenues, and contained a number of undefined terms.[27] However, it is clear that a significant portion, if not 100%, of the Employer's income is derived from the work done by franchisees. As earlier noted, the Employer services approximately 3000 calls per week or over 400 calls a day. It follows from the fact that it retains $1.00 from each voucher submitted, in addition to 15% or 22% of the total set forth on the voucher, that the Employer earns thousands of dollars a day from the services its franchisees perform. Furthermore, since the Employer apparently does not require the operators of inactive franchises to pay "dues" (the service fee of $44.00 per week), or to make payments on the financing the Employer has provided, it follows that the Employer only receives revenues when the franchisees are working.

From the foregoing, it can be presumed that Employer would have an incentive to ***control*** the manner in which franchisees work so as to maximize the number of fares they collect. The record supports this presumption. The Employer, on its own, implemented a computerized dispatch system through which it could rapidly process calls, thus helping it to maximize the number of fares it obtained. Through this system it could oversee the work performed by franchisees and monitor their location at any given time. This close oversight is generally more typical of the employer-employee relationship than the relationship between two businesses. As a result of the computerized dispatch

[27]In the stipulation, the parties label some items that are clearly expenses, such as overhead, and the salaries of employees at the base, as revenues. Some monetary items that are not retained by the Employer, such as sunshine club fees and security fines, are also set forth as revenues. The stipulation states that the

system, franchisees are locked into a protocol they must follow throughout the day. They must book into certain zones that were established by the Employer. They must follow certain other procedures such as generally booking into only one zone at a time, and limiting their breaks to 15 minutes. This system also maximizes the number of calls the Employer services by encouraging franchisees to accept the calls that are offered. Franchisees are penalized for forfeits and bailouts by having their cars booked off the list of vehicles awaiting calls in their zone. When they book back in, their vehicle is placed on the bottom of the list, a significant penalty.

In order to further protect its accounts (i.e., maximize the number of fares collected), the Employer takes various measures to ensure that franchisees provide quality service. It fields complaints from customers and, when customers request it, removes franchisees from their accounts.[28] It causes security slips to be issued when customers complain of poor service. It forbids franchisees from leaving the scene of a no-show without its permission. Through various clauses in its franchise agreement, which the Employer drafted on its own, the Employer

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Employer derives 72% of its revenues from "the net amount that is given to drivers." It is not clear exactly what the parties meant by this.

[28] At one point during his testimony, Slinen maintained that he was not concerned about the quality of customer service or the maintenance of franchisees' vehicles because the Employer only retained a "tiny" portion of what customers pay for their service. As noted above, the Employer appears to derive most if not all of its revenues from the work its franchisees perform, and only earns income when franchisees are working. Slinen's assertion that the Employer is unconcerned about customer service is also undercut by the factors noted above, including the Employer's requirement that franchisees comply with the rules, the penalty for forfeits, and the reporting of alleged infractions to the security committee. In any event, the Board bases its presumption that if an employer's income is derived from fares, it would have an incentive to control the work its drivers perform, upon objective evidence, not subjective assessments.

requires franchisees to adhere to the standards set forth in the rulebook.[29] As earlier noted, the rules are detailed, and include instructions on how to dress, how to maintain their vehicles, what to do in various situations, and how to deal with customers. By means of the franchise contract, the Employer attempts to ensure compliance with the rulebook through various clauses providing that violations of the rulebook are punishable by termination of the agreement.

While several of the rules are not enforced, and the punishment for those that are is invariably less than termination, what is important, to the extent that control remains a relevant consideration, is not merely the exercise of control, but the *right* to control.[30] The clauses in the prospectus and the franchise agreement granting the Employer the right to unilaterally modify the contents of the rulebook take on greater importance in light of this consideration.

The Employer's argument that it leaves much of the control relating to the enforcement of rules to the franchisees themselves becomes less compelling when both the terms of the franchise agreement and the relationship between the Employer and the security committee are examined in greater detail. Initially, it should be noted that the Employer does not allow franchisees to ignore the dictates of the security committee. Rather, the terms of its contract with franchisees provide that franchisees must act in accordance with any rules

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[29] As earlier noted, there is some testimony that suggests that the Employer played a greater role in the creation of the rulebook than it cared to acknowledge. Regardless of whether the franchisees compiled the rulebook in its entirety, as the Employer claims, or whether the Employer played a part in its compilation, as the Petitioner alleges, it is clear that the Employer has a strong interest in seeing that the rulebook is followed. TLC regulations require that the Employer maintain and enforce a rulebook. The franchise agreement specifically forbids franchisees from sharing the contents of the rulebook with those not employed by the Employer.

[30] Amerihealth, supra; Restatement, Section 220(1).

placed in effect by the security committee.[31] They further grant the security committee the right to terminate the employment of a franchisee, as well as to impose other penalties the committee deems appropriate. Thus, through the franchise agreement, the Employer both places various obligations upon its franchisees and the security committee. Inasmuch as the Employer, through this agreement, requires that franchisees follow the directives of the security committee, the record supports a finding that the Employer has designated the security committee as one of its agents. Indeed, it is difficult to believe that the Employer, on its own, would draft a franchise agreement that leaves the enforcement of certain rules to the security committee if it did not expect the committee to act in its interests. It is also difficult to believe that the Employer would reward committee members for their services by waiving their dues if it did not expect them to enforce the rules. Other evidence that tends to indicate a cooperative relationship between the Employer and the security committee includes the annual vehicle inspections performed by the security committee, the cooperation between the General Manager and the security committee in performing these inspections, the office that the Employer has provided to the committee free of charge, the Employer-subsidized printing of the rulebook, and the deductions the Employer makes from the pay of its franchisees when directed to do so by the committee.

Not only does the record show that the security committee has been *designated* as one of the Employer's agents, it establishes that the security

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[31] Employer Exhibit 4, Paragraph 41.

committee in fact *acts* as an agent by vigorously enforcing several of the rules. Although many of the rules set forth in the rulebook are not enforced, it appears that the security committee, sometimes at the request of the Employer, issues numerous security slips. The security chairman only schedules a day of hearings when he has collected 13 security slips he deems worthy of trial, and 6 days of hearings were conducted in 1999. In addition, there were many slips that were issued and subsequently discarded after the security chairman reprimanded the franchisee involved or exonerated him.

I am mindful that the security committee existed prior to Slinen's purchase of the Employer. However, the record does not establish that the committee's role in enforcing the rules was thrust upon the Employer. Rather, contrary to the Employer's contention, the committee does not act as an equal partner with the Employer in conducting its operation, and it is the Employer that determines how much authority to grant the committee. Thus, it was the Employer that, on its own, drafted the franchise agreement. It was the Employer that included clauses in the contract that require franchisees to act in compliance with both the rulebook and certain directives of the committee. It is the Employer that determines the price at which franchises will be sold.[32] It was the Employer that, on its own, designed and implemented the computerized dispatch system that determines the protocol franchisees follow on a day to day basis. It was the Employer that had the penalty for forfeits programmed into the system. It is the Employer that sets fares. Although the Employer may have consulted with the

committee concerning fares and discounts, and occasionally followed its recommendations, it is clear that it is the Employer that negotiates rates with customers and that the final decision concerning fares is left to the Employer. Similarly, it is the Employer that determines the amount that will be deducted from franchisees' pay, and it was the Employer that unilaterally increased this amount without negotiating with the security committee. Thus, there is little doubt that at the time it drafted the franchise agreement, the Employer could have conferred greater responsibilities upon the security committee than it did.

This imbalance provides further support for the conclusion that the relationship between the Employer and its franchisees more closely resembles the employer-employee relationship than the interaction between two businesses. It has also limited the entrepreneurial opportunities that would normally be available to a business. Thus, franchises cannot be transferred without the Employer's written consent. As earlier noted, the franchise agreement appears to provide for a transfer fee, although there is a question as to whether this provision is enforced. In any event, it is unlikely that a company that operated on an equal footing with another business would place restrictions on the sale of that business. There is also very little evidence of transfers between franchisees.[33] It does not appear that franchisees are free to hire individuals to operate their vehicles without the Employer's consent. Again, it does not appear that an employer that regarded another business as its equal

[32] As noted earlier, the record does not support Slinen's bare assertion that the price at which franchises are sold is determined by the committee.
[33] Roadway Express, supra.

would place restrictions upon who that business could hire, and there is no evidence that any franchisees have hired their own employees.[34] Similarly, there is no evidence that any franchisees operate more than one franchise.[35] The clauses in the franchise agreement limiting which companies franchisees may work for and requiring that franchisees obtain the Employer's consent to provide private transportation services, further tend to indicate that the Employer does not view franchisees as individual businesses. Once again, it is unlikely that an employer that regarded another business as its equal would or could place restrictions on which companies or individuals it could do business with. Like the restrictions the Employer places upon the transfer of franchises and the hiring of employees, the limitations the Employer places upon providing transportation services that are not connected to the Employer's business, limits the opportunity for entrepreneurial growth that would normally be available to a business.

Thus, although it can be said that franchisees are required to make a capital investment by purchasing their vehicles, by absorbing the costs to maintain them and acquiring the proper insurance, they are not given the flexibility that would normally be associated with operating an independent business.[36] The computerized dispatch system is programmed in such a manner as to restrict entrepreneurial prerogative. Thus, when franchisees are offered

[34] *Cf.* Dial-A-Mattress; Amerihealth.

[35] *Cf.* Dial-A-Mattress

[36] It is well established that the mere purchase of one's own vehicle is insufficient to confer independent contractor status. Elite Limousine Plus, Inc., 324 NLRB 992 (1997); Fugazy Continental Corp., 231 NLRB 1344 (1977); enf'd, N.L.R.B. v. Fugazy Continental Corp., 603 F.2d 214, 1979 WL 30910 (2nd Cir., 1979), enf'd, 817 F.2D 979 (2nd Cir. 1987).

fares they are not given any information about the customer or his destination. They do not receive this information unless they accept the fare. If they willfully forfeit the job prior to being given the information, or bail out after they are informed of the passenger's destination they are booked out of the zone and are placed at the bottom of the list when they book back in. Accordingly, franchisees are denied the information that would be necessary for them to make a judgment as to whether they should accept a fare or forgo it in the hope that a more profitable fare will be offered in the future.[37] Commenting on a similar system in Yellow Cab of Quincy, the Board stated: "It is difficult to imagine what other information would be more crucial to the driver when he decides whether or not to accept a fare from the dispatcher. Thus, the Employer can effectively regulate how much and what type of business each driver receives."[38] Moreover, the rulebook limits further entrepreneurial initiative by prohibiting franchisees from booking their own customers. As earlier noted, there is no evidence that any franchisee has attempted to book any passengers. Thus, franchisees are totally dependent upon the dispatch service and the three lines the Employer services for obtaining work.

[37] As discussed earlier, Rutenberg's testimony that franchisees are, in effect, free to mislead the dispatcher by requesting that their names be restored to the top of the list in situations where the forfeit was not due to a computer malfunction, has little support in the record. Dispatchers often refuse to place franchisees at the top of the list if they do not believe the forfeit was due to a computer malfunction. It appears from Thandi's testimony that franchisees will only ask him to direct the dispatcher to restore their names to the top of the list if the forfeit was due to problems with the computer. It is also clear that both forfeits and misleading the dispatcher are officially discouraged. Although this provision is not enforced, the rulebook provides that forfeits are punishable by a $150 fine for the first offense. The rulebook (page 38) further provides that franchisees will be subject to a $150 fine for "misleading dispatcher or supervisor." One of the violations set forth on the preprinted security slips is also "misleading dispatcher."

[38] Yellow Cab of Quincy, supra at 145.

Even with regard to the franchisee's initial capital investment, there are restrictions concerning what type of vehicle they may operate.

What little flexibility franchisees appear to exercise is chiefly with regard to setting their own hours, removing their names from certain accounts and determining what zones they will work in. It is well established that this freedom, standing alone, is insufficient to elevate one to an independent contractor level.[39]

Although the "by the job" method of payment is often associated with independent contractor status, the significance of this factor diminishes when considered in the context of the Employer's overall economic relationship with its franchisees.[40] Franchisees are not hired for specific projects as this payment method would appear to suggest. Rather, the financing the Employer provides on the purchase of franchises and the installation of the computers locks franchisees into a long-term relationship with the Employer. The weekly fee the Employer charges for the use of its dispatch service also suggests a relationship that extends beyond individual jobs.

Accordingly, I find that franchisees are employees within the meaning of Section 2(3) of the Act. With regard to the franchisees on the security committee, I have found that when they act in their official function as committee members they are agents of the Employer. However, these individuals spend a significant portion of their time operating their own franchises. Because they spend much of their time functioning as employees, and the portion of their time

[39] Elite Limousine at 1002; N.L.R.B. v. United Insurance Company, 390 US 254 (1968).

[40] The simple fact that franchisees are, in effect, paid by commission, is insufficient to confer independent contractor status. N.L.R.B. v. United Insurance; Elite Limousine.

spent acting as committee members is not clear from the record, I will allow them to vote subject to the challenged ballot procedure.

I thus find the following unit is appropriate for the purposes of collective bargaining:

> All drivers (franchisees) employed by the Employer including those who own or lease radios excluding all office clerical employees, professional and managerial employees, dispatchers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an

economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by Local Lodge 340, District Lodge 15, International Association of Machinists and Aerospace Workers, AFL-CIO, by Local 713, International Brotherhood of Trade Unions, affiliated with National Organization of Industrial Trade Unions, or by neither labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the issuance of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before July 26, 2000. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement

shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by August 2, 2000.

Dated at Brooklyn, New York, this 19th day of July, 2000.

/s/ ALVIN BLYER

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Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
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